

## Draft paper for comment

### STRICT LIABILITY

**(1) Imposing strict civil liability on drivers of all motor vehicles for injury or damage caused to vulnerable road users (pedestrians, pedal cyclists, etc)**

**(2) Imposing strict civil liability on pedal cyclists for injury or damage caused to pedestrians.**

*“In the present state of motor traffic, I am persuaded that any civilised system of law should require, as a matter of principle, that the person who uses this dangerous instrument on the roads – dealing death and destruction all round – should be liable to make compensation to anyone who is killed or injured in consequence of the use of it. There should be liability without proof of fault. To require an injured person to prove fault results in the gravest injustice to many innocent persons who have not the wherewithal to prove it.” Lord Denning (1982)*

1. Almost three decades have passed since the late Lord Denning issued this controversial statement, and in the meantime over 30,000 pedestrians and 5,000 cyclists have died on UK roads, almost all as a result of collision with a motor vehicle.<sup>1</sup> Over the same period the potential for dealing “death and destruction” has increased by almost 70%, the number of motor vehicles on British roads having grown from 20 million then to 33 million now. Yet, whenever the imposition of strict civil (*not even criminal*) liability on the motorist is suggested, or merely rumoured - as it was recently, drawing vehement denial from the Department for Transport - the reaction from motorists, their insurers, and much of the press is distinctly hostile, all of them forgetting that they, or their families, will most days, at some time or other, be themselves vulnerable pedestrians or cyclists.

2. Many European countries already have some form of presumed driver liability. It is a way of protecting the more vulnerable in society from those who pose the greatest harm to them, and acknowledges that motor traffic abuse is vastly more frequent, causing at least as much physical and psychological damage, as those varieties (e.g. child abuse, by means other than the use of a motor vehicle) which are less frequent, but generate more public attention, and have brought about extensive and sometimes intrusive protection measures.

3. For our continental neighbours “strict liability” is a system where drivers are presumed to be liable for damage or personal injury suffered by pedestrians and cyclists as a consequence of a collision with their vehicles, irrespective of who is at fault. More often than not, the driver actually is at fault in a collision with a cyclist or pedestrian, but this can take the non-motorised victim years to establish in law, causing further financial stress and anguish to the injured and bereaved. Sometimes, thanks to the injuries suffered by the victim, there is a lack of evidence making it impossible to prove negligence. Sometimes there is none to be proved, for example, where a driver has a sudden, unexpected heart attack, and his or her vehicle mounts the pavement, crushing pedestrians under the wheels or against a wall.

4. In Austria, Denmark, France, Germany, Italy, the Netherlands, and Sweden the rule (variable but essentially the same in all these nations) is that the driver of the motor vehicle should automatically, and regardless of negligence, be held liable for the injury caused to pedestrians or cyclists by his or her use of that vehicle on (or off) the road.

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<sup>1</sup> <http://www.roadpeace.org/documents/Strict%20liability%20discussion%20paper.pdf>

5. There are of course exceptions to cover the case where the pedestrian or cyclist has clearly and deliberately caused the collision, but mere inadvertence, inexperience, or carelessness on the part of a victim will not excuse the other motorised party. Strict liability for any injury or damage caused is the realistic price exacted for the exercise of a mighty privilege.

6. Many variations are possible: in some jurisdictions the principle is restricted to certain classes of victim. For example, if a motor vehicle collides with and injures a child under twelve, or an elderly person over seventy the principle of 100% strict or “absolute” liability will apply to the driver, the victims being considered too inexperienced, or lacking comprehension, or simply not sufficiently fleet of foot to avoid conflict with the “dangerous instruments” which some members of society insist on imposing on others. The roads, other than motorways, are, after all, open to everybody, and always have been.

7. Those who support Lord Denning’s proposal argue, as he does, that presumed liability is necessary to give the more vulnerable road users a better chance of securing well-deserved compensation for damage and injury. The additional beneficial psychological effect on driving behaviour of presumed driver liability, however, should not be ignored. At present, jumping into a motor vehicle, and driving off, is a casual action, the mind on everything but the immediate activity, with no conscious acknowledgement of an immense responsibility for the safety of others. If drivers were to be more acutely aware that any mistakes or recklessness on their part would inevitably result in a successful claim whereby they are likely to lose both their excess, and no-claims bonus, it could in itself reduce road casualty figures, result in smaller or fewer claims, lower payouts by insurance companies, and eventually, a reduction in premiums.

8. Some supporters of the proposal have suggested that it could be more acceptable to drivers if there were a hierarchy of liability which would impose strict liability on drivers of heavier, larger, or faster, vehicles with regard not only to pedal cyclists and pedestrians but also with regard to lighter, smaller, or slower motor vehicles. There are various objections to this approach.

9. First, it would be difficult to classify vehicles in a way which is immediately recognisable to road users. While it is obvious to anyone who is a pedestrian or pedal cyclist, it would not be immediately clear, with regard to another motor vehicle, on which driver the strict liability burden would rest (for example, between the driver of a people carrier which is large, and the driver of a tank-like 4 x 4 which is heavy, or between the drivers of two small cars of similar size where the difference in weight is no more than a kilogram or two). The hierarchy would be attractive only to drivers of small cars, and many of them aspiring to something larger or heavier, would resent the possible imposition of strict liability when they move up to a larger vehicle.

10. Second, having a hierarchy among motor vehicles would blur the clear recognition that strict liability to pedestrians and cyclists is a *quid pro quo* for the intrusion and danger the introduction of *any* motor vehicle imposes on society. No matter how small, light, or slow, a motor vehicle has an obviously far greater destructive power than any pedal cycle or pedestrian. This is a matter of simple perception well founded in the evidence, both anecdotal and statistical. Therefore no need for a classification bureau! Lump all motor vehicles together. Motorists’ support for the proposal, regardless of their vehicles’ destructive power, would be better acquired by reminding them that they, members of their families, relations, and friends, are all, at some time, often on a daily basis, vulnerable road users when they walk or cycle.

11. However, to bring more *pedestrians* on-side it would be advisable to have a simple three-tier hierarchy as follows:

- (i) drivers of motor vehicles (to include those with two, four, or more wheels) with strict liability for injury or damage to pedal cyclists (including those riding cycles which are electrically accelerated and comply with the EAPC regulations of 1983), electric mobility scooters, etc, pedestrians, roller bladers, etc
- (ii) pedal cyclists, etc with strict liability to pedestrians, etc, and
- (iii) pedestrians, including roller bladers, wheel chair users, etc, with no strict liability to anyone.

12. Each of these categories is easily recognisable without having to consult a classification table, a difficult thing to do while driving, and more readily achieving what is required, a recognition in the mind of all drivers *while on the road* that they are engaging in a privileged activity which is inherently dangerous to any more vulnerable road users whom they encounter.

13. Where a collision occurs between vehicles which are all in tier (i) or tier (ii), strict liability would not apply as the drivers of vehicles in the same tier are equally vulnerable to each other.

14. Fortunately this is a road traffic policy area where the Scottish Government could act immediately, without waiting for Westminster. Road traffic law, the right to drive, the requirement to be insured, and the various criminal offences which can be committed are not devolved matters, but the imposition of strict liability on road users (including a hierarchy of liability) are matters on which Holyrood could legislate. By doing so, Scottish Government would demonstrate, as it has with the sale and use of tobacco, and the, so far partially and speciously resisted, discouragements to the purchase of alcohol, that it is capable of seizing the policy initiative in any devolved matter, thereby developing for Scotland a saner, safer, and fully inclusive society.

15. The principle of strict liability is not as foreign to the jurisdictions of the UK, Ireland, and the United States, as some may think. The foundation for strict liability was laid down in the nineteenth century. Where an escape of water from a reservoir flooded a mine, an English case, *Rylands v Fletcher*, established that the liability for the consequences of non-natural operations on land rests with the owner of the land. The ruling stated: "Anyone who brings or collects and keeps on ... land anything likely to do mischief if it escapes must keep it at his peril and if he does not do so is prima-facie strictly liable for all that damage which is the natural consequence of its escape".

16. Just substitute the keeping of a motor vehicle and its introduction to the streets and roads, to see why a logical and rational extension of this principle requires the motorist to be strictly liable for all the mayhem which may result. Unfortunately the principle of *Rylands* has been disowned by Scots law, and has in any case been refined by the House of Lords to the effect that strict liability exists only for harm resulting from the miscarriage of a lawful activity which *given its location and manner, is unusual, extraordinary, or inappropriate*. Driving a motor vehicle on the public roads is a "lawful activity", even when accompanied by the commission of a multiplicity of offences, and nowadays is universally regarded as usual, ordinary, and appropriate. Legislation therefore will be required to extend the principle to motorists (as it already has for liability for animals, and defective products).

17. “Liability” and “duty of care” should not be confused. Everyone has a duty of care to everyone else as they go about their daily affairs. That is why pedestrians and cyclists are well advised to carry some form of public liability insurance (which is usually a cheap add-on to the insurance covering the household in which they live), and motorists are compelled to have insurance for liability to third parties. Currently when a driver is in breach of the duty of care the victim has to prove that breach in order to establish liability. Under strict liability the collision itself, and the injury and damage suffered by the victim, would be absolute proof of the driver’s breach of the duty of care.

18. The legal technicalities involved in the introduction of strict liability legislation, and the form it should take, are matters for the parliamentary draftsman at Holyrood. Such legislation would find a useful precedent for both style and content in the:

### **Animals (Scotland) Act 1987<sup>2</sup>**

1-(1) Subject to ... section 2 of this Act, a person shall be liable for any injury or damage caused by an animal if—

(a) at the time of the injury or damage complained of, he was a keeper of the animal; ...

*[which in the proposed legislation would read as follows: Subject to section 2 of this [Strict Liability (Scotland)] Act, a person shall be liable for any injury or damage to a pedestrian or pedal cyclist caused by a motor vehicle if—*

*at the time of the injury or damage complained of, he was the driver of the motor vehicle;*

*Subject to section 2 of this Act, a person shall be liable for any injury or damage caused to a pedestrian by a pedal cycle if—*

*at the time of the injury or damage complained of, he was in charge of the pedal cycle]*

2 - (1) A person shall not be liable under section 1(1) of this *[Strict Liability (Scotland)]* Act if—

(a) the injury or damage was due wholly to the fault of—

(i) the person sustaining it; ...

In section 2 “wholly” is required, and should not be qualified by “or partially”. To do so would enable the motorist *vis a vis* a pedal cyclist or pedestrian (or pedal cyclist *vis a vis* pedestrian) to have almost every claim decided under the current (non-strict) liability rules, as, in most cases, the defender could allege a degree of fault (no matter how slight) on the part of the victim/pursuer for strict liability to fly off, thereby nullifying the principle that those who exercise the privilege of bringing dangerous vehicles onto streets and roads should still be strictly liable for any injury or damage which they cause, regardless of inadvertence, mistake, or bad luck on the part of the victim.

It should also be noted that one of the reasons for introducing strict liability is that when a motor vehicle collides with a pedestrian or cyclist the victim is often so badly shocked or injured that he or she is unable to provide evidence of the circumstances in which the collision occurred. That makes it all the easier for the motorist/defender to allege partial fault on the part of the victim, and thereby evade strict liability.

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<sup>2</sup> [http://www.opsi.gov.uk/acts/acts1987/pdf/ukpga\\_19870009\\_en.pdf](http://www.opsi.gov.uk/acts/acts1987/pdf/ukpga_19870009_en.pdf)

If the principle of strict liability is acceptable with regard to animals which overall, and in individual cases, rarely cause anything like the degree of injury and damage which motor vehicles do, the case for applying strict liability to the drivers of motor vehicles is all the stronger. There should therefore be no possibility of evading strict liability by offering to prove that the victim was anything less than “wholly” at fault (as for example in a suicide attempt).

## **Summary**

### **Advantages of Strict Liability**

1. It requires drivers of motor vehicles to acknowledge the dangers inherent in exercising the privilege of their introducing motor vehicles on to public roads and streets.
2. It penalises a breach of the duty of care which drivers owe to vulnerable road users, by making drivers liable for any injury or damage they cause them.
3. It removes the requirement for victims to prove a breach of the duty of care, something they are less able than drivers of motor vehicles to do, thanks to their greater vulnerability to injuries which preclude them from providing personal evidence of collisions.
4. It will persuade drivers of motor vehicles to drive more carefully in the vicinity of vulnerable road users, resulting incidentally in an improvement in driving standards overall, fewer deaths and injuries, and a reduction in insurance premiums.
5. By imposing a “civil penalty”, (loss of no claims bonus, and excess) it will compensate to some extent for the failure of the police, prosecutors, and courts to detect, prosecute, and penalise criminal offenses perpetrated by bad driving.

### **Method of implementation in Scotland by Scottish Government**

1. As introduction of a strict liability requirement for a breach of the duty of care which everyone has to everyone else, does not in any way over-ride or conflict with, UK road traffic law, it will be possible for the Scottish Government to promulgate such legislation without reference to the Westminster Government.
2. A precedent for the form and content of the required legislation is found in the Animals (Scotland) Act 1987